

LIB

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
KAR-VEL CONSTRUCTION COMPANY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 83-7

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal from the issuance by respondent of a \$1,000 civil penalty (DE 82-423), came before the Pollution Control Hearings Board, David Akana (presiding), Gayle Rothrock, Chairman, and Lawrence J. Faulk, at a formal hearing on May 16, 1983, in Lacey, Washington.

Respondent was represented by Charles K. Douthwaite, Assistant Attorney General; appellant was represented by its president, Gary Waldner. The proceedings were recorded electronically.

Having heard the testimony, having examined the exhibits, and

1 having considered the contentions of the parties, the Board makes these

2 FINDINGS OF FACT

3 I

4 Respondent Department of Ecology is the state agency charged to
5 administer and enforce the provisions of chapter 90.48 RCW.

6 II

7 Appellant Kar-Vel Construction Company, Inc., is a public utility
8 contractor with its principle place of business in Kent, Washington.

9 III

10 In May of 1982, appellant installed about 880 feet of new 10-inch
11 water main along NE 38th Street between 131st Avenue NE and 134th
12 Avenue NE in Bellevue under a contract with the City of Bellevue. The
13 contract with the City prohibited the disposal of chlorinated water
14 into a storm drain or waterway. Such discharge could be made into a
15 sanitary sewer if done at an appropriate flow rate.

16 IV

17 On Friday, May 14, 1982, appellant prepared the water main pipe
18 for chlorination. One gallon of chlorox was introduced into the pipe
19 near a valve situated at 131st Avenue NE. The valve was slightly
20 opened and water from another main was slowly introduced into the new
21 pipe. The system remained as such over the weekend.

22 V

23 On Monday, May 17, appellant returned to the site. After the
24 trapped air in the system was bled, the new pipe was completely filled
25 with water and pressure tested. After testing, the chlorinated water

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER

1 was flushed from the system starting at about 2:00 p.m. Flushing this
2 system involved first opening the valve connection at the 131st Avenue
3 NE (west) location and allowing it to flow out (east) at about the
4 midpoint of the new line through a two-inch standpipe for about 45
5 minutes. From the standpipe, the chlorinated water flowed through 150
6 feet of fire hose, then was discharged over the open road into a catch
7 basin located on the north side of NE 38th Street at its intersection
8 with 134th Avenue NE. The second step involved opening the valve
9 connection at the 134th Avenue NE (east) location and allowing
10 chlorinated water to flow for about 45 minutes from that portion of
11 the line to discharge through the standpipe to the same catch basin
12 near 134th Avenue NE. This catch basin eventually discharged into a
13 retention pond to the south along 134th Avenue NE. If the water
14 flowed west instead of east, to a catch basin at the intersection of
15 NE 38th Street and 131st Avenue NE, it would travel through a storm
16 sewer and be discharged into the head of Kelsey Creek about 45 minutes
17 later.

18 VI

19 Some time before 3:00 p.m. on May 17, several persons witnessed
20 commotion in the waters of Kelsey Creek in a residential development
21 known as Bridlewood. The commotion turned out to be a fish kill in
22 progress. Many dying and dead fish were seen along the banks. The
23 event was reported to the City of Bellevue, then later to the
24 Department of Ecology. The Department of Fisheries and Game were also
25 notified. The City was the first to respond.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHD No. 83-7

VII

Fish carcasses were bagged by the City. Later, when the bodies were examined, it was not certain what had killed the fish.

VIII

The evidence does not exclude appellant's chlorination work as a possible cause of the event. Appellant had been operating in the area with chlorine at the time of the event. The concentration of chlorine in the pipe was about thirteen parts per million (ppm) to which about four volume changes of water were added to flush the pipe. The resulting concentration, assuming complete mixing of the water would exceed the concentration of chlorine (0.8 ppm) which could kill fish within 45 minutes. An analysis of fish bodies could not eliminate chlorinated water as a cause of the fish kill. The absence of algae on the bleached gravel of the stream bed was evidence of the recent passage of chlorinated water. Also, there were no living crayfish on the bottom. The catch basin at 131st Avenue NE is directly connected by storm sewer pipe to the head of Kelsey Creek, where the fish kill began. Finally, there was no other activity in the area which might have caused the water pollution and fish kill.

IX

A resource damage assessment was conducted by respondent. The loss was estimated at 200 cutthroat trout ranging in size from 2.3 inches to 12 inches in length.

X

After inspecting the surrounding area and interviewing appellant,

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 83-7

1 respondent concluded that the only cause for the pollution of state
2 water and the fish kill consistent with known facts was that appellant
3 had caused it. A \$1,000 civil penalty was assessed. After a request
4 for relief from the penalty was denied by respondent, appeal was taken
5 to this Board.

6 XI

7 Appellant's employees denied discharging any water from the
8 initial pipe flushing operation into the west catch basin at 131st
9 Avenue NE on May 17. Admissions made to respondent's employees
10 relating to the discharge of chlorinated water into the west catch
11 basin because of a traffic problem were denied at the hearing. One
12 small discharge was admitted by appellant, however.

13 After flushing was completed, the standpipe was changed to a
14 one-inch diameter size. Before water samples were taken by the City
15 inspector at 3:45 p.m., water was run onto the road for about ten
16 minutes. Water from this test went to both catch basins on the east
17 and west. This latter discharge is not alleged to have caused the
18 incident in question.

19 XII

20 Any Conclusion of Law which should be deemed a Finding of Fact is
21 hereby adopted as such.

22 From these Findings the Board comes to these

23 CONCLUSIONS OF LAW

24 I

25 RCW 90.48.080 makes it unlawful to pollute state waters:

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCMB No. 83-7

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters.

II

"Pollution" is defined in RCW 90.48.020:

Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life....

Chlorine and chlorinated water are substances which can cause pollution of state waters.

III

The evidence is conflicting. However, reviewing and weighing all the evidence, we conclude that appellant violated RCW 90.48.080 by discharging chlorinated water into Kelsey Creek, a water of the state, on May 17, 1982.

IV

RCW 90.48.144 provides for a civil penalty of up to \$5,000 per day for each violation of RCW 90.48.080

The amount of the civil penalty, \$1,000, is reasonable in light of

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

1 the facts and circumstances of this case and the maximum allowable
2 penalty.

3 V

4 The \$1,000 civil penalty should be affirmed.

5 VI

6 Any Finding of Fact which should be deemed a Conclusion of Law is
7 hereby adopted as such.

8 From these Conclusions the Board enters this
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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 83-7

ORDER

The \$1,000 civil penalty and Order DE 82-423 are affirmed.

DONE this 26th day of May, 1983, at Lacey, Washington.

POLLUTION CONTROL HEARINGS BOARD

David Akana

DAVID AKANA, Lawyer Member

Gayle Rothrock

GAYLE ROTHROCK, Chairman

See Dissenting Opinion

LAWRENCE J. FAULK, Member

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STATE OF WASHINGTON

IN THE MATTER OF
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Dissenting Opinion

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Having heard the testimony, having examined the exhibits, and

1 having considered the contentions of the parties, the Board makes these

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11 water main along NE 38th Street between 131st Avenue NE and 134th
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13 contract with the City prohibited the disposal of chlorinated water
14 into a storm drain or waterway. Such discharge could be made into a
15 sanitary sewer if done at an appropriate flow rate.

16 IV

17 On Friday, May 14, 1982, appellant prepared the water main pipe
18 for chlorination. One gallon of chlorox was introduced into the pipe
19 near a valve situated at 131st Avenue NE. The valve was slightly
20 opened and water from another main was slowly introduced into the new
21 pipe. The system remained as such over the weekend.

22 V

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24 trapped air in the system was bled, the new pipe was completely filled
25 with water and pressure tested. After testing, the chlorinated water

26 Dissenting Opinion
27 PCHB No. 83-7

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19 commotion in the waters of Kelsey Creek in a residential development
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21 progress. Many dying and dead fish were seen along the banks. The
22 event was reported to the City of Bellevue, then later to the
23 Department of Ecology. The Department of Fisheries and Game were also
24 notified. The City was the first to respond.

VII

Fish carcasses were bagged by the City. Later, when the bodies were examined, it was not certain what had killed the fish.

VIII

The evidence does not remove appellant as a possible cause of the event. Appellant had been operating in the area with chlorine at the time of the event. The concentration of chlorine in the pipe was about thirteen parts per million (ppm) to which about four volume changes of water were added to flush the pipe. The resulting concentration, assuming complete mixing of the water would exceed the concentration of chlorine (0.8 ppm) which could kill fish within 45 minutes. An analysis of fish bodies could not eliminate chlorinated water as a cause of the fish kill. The absence of algae in the stream bed was evidence of the recent passage of chlorinated water. Finally, the catch basin at 131st Avenue NE is directly connected to the head of Kelsey Creek, where the fish kill began.

IX

A resource damage assessment was conducted by respondent. The loss was estimated at 200 cutthroat trout ranging in size from 2.3 inches to 12 inches in length.

X

After inspecting the surrounding area and interviewing appellant, respondent concluded that the only cause for the pollution of state water and the fish kill consistent with known facts was that appellant had caused it. A \$1,000 civil penalty was assessed on December 16,

1 1982. After a request for relief from the penalty was denied by
2 respondent, appeal was taken to this Board on January 7, 1983.

3 XI

4 Appellant's employees denied discharging any water from the
5 initial pipe flushing operation into the west catch basin at 131st
6 Avenue NE on May 17. Admission made to respondent's employees
7 relating to the discharge of chlorinated water into the west catch
8 basin because of a traffic problem were denied. One discharge was
9 admitted by appellant, however.

10 This discharge occurred after flushing was completed when the
11 standpipe was changed to a one-inch diameter size. Before water
12 samples were taken by the City inspector at 3:45 p.m., water was run
13 onto the road for about ten minutes. Water from this test went to
14 both catch basins on the east and west. This discharge is not alleged
15 to have caused the incident in question.

16 XII

17 Any Conclusion of Law which should be deemed a Finding of Fact is
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19 From these Findings the Board comes to these

20 CONCLUSIONS OF LAW

21 I

22 RCW 90.48.080 makes it unlawful to pollute state waters:

23 It shall be unlawful for any person to throw, drain,
24 run, or otherwise discharge into any of the waters of
25 this state, or to cause, permit or suffer to be
26 thrown, run, drained, allowed to seep or otherwise
27 discharged into such waters any organic or inorganic

26 Dissenting Opinion
27 PCHB No. 83-7

1 matter that shall cause or tend to cause pollution of
2 such waters.

3 II

4 "Pollution" is defined in RCW 90.48.020:

5 Whenever the word "pollution" is used in this chapter,
6 it shall be construed to mean such contamination, or
7 other alteration of the physical, chemical or
8 biological properties, of any waters of the state,
9 including change in temperature, taste, color,
10 turbidity, or odor of the waters, or such discharge of
11 any liquid, gaseous, solid, radioactive, or other
substance into any waters of the state as will or is
likely to create a nuisance or render such waters
harmful, detrimental or injurious to the public
health, safety or welfare, or to domestic, commercial,
industrial, agricultural, recreational, or other
legitimate beneficial uses, or to livestock, wild
animals, birds, fish or other aquatic life....

12 chlorine and chlorinated water are substances which can cause pollution
13 of state waters.

14 III

15 The evidence is conflicting. Reviewing and weighing all the
16 evidence, I conclude that appellant did not violate RCW 90.48.080 by
17 discharging chlorinated water into Kelsey Creek, a water of the state,
18 on May 17, 1982.

19 IV

20 The \$1,000 civil penalty should be vacated

21 VI

22 Any Finding of Fact which should be deemed a Conclusion of Law is
23 hereby adopted as such.

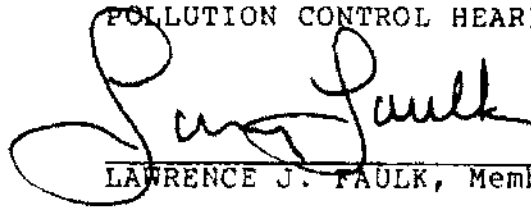
24 From these Conclusions the Board enters this

ORDER

The \$1,000 civil penalty and Order DE 82-423 is vacated.

DONE this 26th day of May, 1983, at Lacey, Washington.

POLLUTION CONTROL HEARINGS BOARD

A handwritten signature in dark ink, appearing to read "Lawrence J. Faulk", is written over a horizontal line.

LAWRENCE J. FAULK, Member